IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No. 461 of 1997
Date of Decision: 08.08.2006

SHAM LAL

.....APPELLANT

VERSUS

RAM PIARA

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE MAHESH GROVER.

Present: Mr.R.C. Setia, Sr. Advocate with
Mr. Sidharth Sarup, Advocate
for the appellant.
Mr. C.L.Verma, Advocate,
for the respondent.

MAHESH GROVER,J.(ORAL)

The plaintiff has filed this appeal against the judgment and decree of the learned Lower Appellate Court dated 12.08.1996.

Brief facts of the case are that the appellant filed a suit for possession of the suit property on which it was alleged that the respondent had un-authorized possession. In the suit prayer was also made for recovery of Rs.1800/- on account of the use and occupation of the suit property at the rate of Rs.50/- per month till 03.10.1989.

The respondent contested the suit to say that the appellant had executed an agrement to sell dated 14.04.1978 in his favour and in pursuance to this a consideration of Rs. 2500/- was also paid to him and a receipt to this effect was executed by the appellant and the respondent was put in possession in pursuance to the agreement and ,therefore, this possession was protected under the provision of Section 53(A) of the Transfer of Property Act, 1882 as it amounted to part performance of the sale which was alleged to have been executed by the appellant in favour of the respondent.

On the pleading of the parties, following issues were framed:-

1. Whether the plaintiff is entitled to the possession of the suit property?OPP
2. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD
3. Whether the suit is not maintainable in the present form?OPD
4. Whether the plaintiff has got no locus standi to file the presnet suit ?OPD.

Both the parties led their respective evidence and after perusal of the same the trial Court decreed the suit of the appellant. In appeal the findings of the learned trial court were upheld, which resulted in this appeal having been filed by the plaintiff-appellant.

It was contended by Mr. Setia, learned counsel for the appellant that prior to filing of the suit, the appellant had filed a petition under the provision of the Rent Act seeking the eviction of the respondent. In these proceedings, respondent had denied the relationship of landlord and tenant and set up this agreement to sell. The learned Rent Controller had dismissed the petition by holding that there was no relationship of landlord and tenant and that there was an agreement to sell to have been executed by the appellant in favour of the respondent. It was in this back drop that the appellant was constrained to file the present suit for possession of the suit property. It is further contended by him that the appellant in pursuance to the agreement had always been ready and willing to perform his part of the contract. As per the terms of the agreement he was present before the Sub-Registrar on 25.09.1989, which was the stipulated date for execution of the sale deed. Ex. D1 is the affidavit to that effect which was furnished before the Sub-Registrar. In contrast, the respondent has not even pleaded in his written statement that whether he was ever ready and willing to

perform his part of the agreement. In view of this fact, the respondent had no right to continue as he had defied the agreement to sell and, therefore, could not continue to be in possession of the suit property.

Shri Verma, learned counsel for the respondent on the other hand contended that the agreement which was sought to be denied by the appellant, should be taken to be indicative of the fact that he was never willing to perform his part of the agreement.

I have heard the learned counsel for the parties at length and am of the considered view that this appeal deserves to be allowed.

The factum of the agreement to sell has been established by both the Courts below, which is a question of fact and cannot be agitated in the Regular Second Appeal. Therefore, the sole question that is to be determined is as to whether the appellant was willing to perform his part of the agreement and that whether the respondent defaulted in carrying out his part of the obligation. The appellant has produced on record Ex. P1 to show that he was always willing to perform his part, which is borne out from the affidavit produced before the Sub-Registrar.Respondent has also produced on record Ex. D1 & D2 to substantiate his presence before the Sub-Registrar to complete his part of the transaction.

However, this plea of the respondent does not inspire confidence. At no stage did he make any attempt to seek the execution of the sale deed and it was only the appellant who had come up initially by way of rent petition and now by way of a suit to seek the possession of the suit property. Besides there is not a single averment in the written statement, which shows that the respondent was ever willing and ready to perform his part of the agreement.

Reliance was placed on a judgment of this Court reported as ***Om Parkash v. Sharma Electric Company, 1985(1) PLR, 198*** . The observations of this Court are as follows:-

"Where an owner of a house filed a suit for recovery of arrears of rent against his tenant and for his eviction from one room demised to him but the defendant pleaded that the plaintiff had entered into agreement to sell the house to him and thus denied relationship of landlord and tenant between parties. The defendant, however, did not plead that he had performed or was willing to perform his part of the contrct.

Held, that in this written statement the defendant never pleaded that he had performed or was willing to perform his part of the contrat. Unless this was pleaded, the provisions of Section 53-A of the Transfer of Property Act were not attracted. The defendant also never filed any suit for the speciofic performance of the agreement. Under these circumstances the earnest money paid will stand forfeited".

The observations aforesaid are straightway attracted to the facts of the present case.

The question of law that would arise in the present appeal:

"Whether, in the facts and circumstances of the case, protection under Section 53(A) of the Transfer of Property Act is available to the respondent"?

Section 53 of the Transfer of Property Act, 1882 is as follows:-

53A. Part performance.- *Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from whih the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part*

performance of the contract, taken possession of the property or any part thereof, or the transfere, beig already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, then, nothwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner presribed therefor by the law for the time being in force, the transferor or any person claimingh under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

It is clear from the perusal of the aforementioned re-produced provisions of law that one of the essential ingredients to protect the transferee in an agreement, which has been partly performed is " that the transfere has performed or is willing to perform his part of the contract".

Now adverting to the facts of the present case, it is clear that after the execution of the agreement to sell an amount of Rs.2500/- was paid to the appellant. But thereafter the respondent who was the transferee under the agreement could not demonstrate that he was willing to perform his part of the contract. No plea was taken by him in the written statement that he was willing to

perform his part of the contract. Therefore, the protection of Section 53(A) cannot be afforded to him.

Section 53(A) of the Act is intended to protect the bonafide transferee under the agreement, who has performed his part of the agreement, which could not be completed in the manner, which was prescribed. The inherent and underlying principle under this provision of law is that the bonafides of the transferee has to be established by his conduct which will go on to establish that he was always willing to perform his part of the contract but it could not be performed for some other reasons.

The inevitable conclusion therefrom is that the respondent has failed to show that he was willing to perform his part of the agreement and has also failed to establish his bonafides.

The question of law raised in this appeal stands answered in the foregoing discussion.

For the reasons stated above, the present appeal is allowed, the judgment of learned Lower Appellate Court is set aside and the suit of the plaintiff-appellant for possession is decreed.

August 08, 2006 **(MAHESH GROVER)**
nt **JUDGE**